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International Criminal Defence Ethics: The Law of Professional Conduct for Defence Counsel Appearing before International Criminal Tribunals

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International Criminal Defence Ethics: The Law of Professional Conduct for Defence Counsel Appearing Before International Criminal Tribunals

MICHAEL BOHLANDER*

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I. INTRODUCTION

The UN Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ in 1993 and the International Criminal Tribunal for Rwanda (ICTR)² in 1994 as instruments under

1. The tribunal's formal name is the International Tribunal for the Prosecution of Persons for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY). The principal document of the ICTY is Security Council Resolution 827, to which is annexed the Statute of the ICTY. See S.C. Res. 827, U.N. SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993), *reprinted in* 32 I.L.M. 1203 [hereinafter the ICTY Statute]. The current annual report of the ICTY transmitted each August from the ICTY President to the Security Council and the General Assembly is a good source of information on the ICTY. See Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/52/375-S/1997/729 (1997) (fourth annual report). The Security Council established the ICTY on 25 May 1993. The ICTY is mandated to adjudicate prosecutions of persons responsible for serious violations of international law committed on the territory of the former Yugoslavia since 1991. See generally M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995); Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1 (1995); Sean Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57 (1999); James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993); Symposium, *The International Tribunal for the Former Yugoslavia Comes of Age*, 7 EUR. J. INT'L L. 245 (1996).

2. The tribunal's formal name is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens (ICTR). See S.C. Res. 955, U.N. SCOR, 49th Sess., Res. & Dec., at 15, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 [hereinafter the ICTR Statute]. The Security Council established the ICTR on 22 February 1995. The ICTR is mandated to adjudicate prosecutions of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States,

chapter VII of the UN Charter.³ They are the first genuine international criminal tribunals since the Nuremberg⁴ and Tokyo Tribunals.⁵ The novel situations of the ICTR and ICTY Tribunals raised the question of determining the rules of professional ethics for counsel appearing before the Trial and Appeals Chambers. It was clear that mere reference to their respective domestic systems was impracticable and perhaps even legally impossible because of the need for a common standard for the tribunals.⁶

between 1 January 1994 and 31 December 1994. See generally Payam Akhavan, *Current Developments: The International Criminal Tribunal For Rwanda: The Politics & Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996); Symposium, *War Crimes Tribunals*, 13 AM. U. J. INT'L L. & POL'Y 1469 (1988).

3. U.N. CHARTER arts. 39-51 ("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression").

4. The Nuremberg trials of German war criminals after 1945 represented the first attempt of the international community to deal in a judicial manner with war time atrocities, and especially atrocities of one of the parties to the conflict against its own citizens, a new category of offences named crimes against humanity. The records of the proceedings can be found in I-XLII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946. For further reading and reference to the actual trial material and judgment see Cherif Bassiouni, *Outline: International Criminal Investigations and Prosecutions: From Versailles to Rwanda*, in 3 INTERNATIONAL CRIMINAL LAW 31-86 (Cherif Bassiouni ed., 2d ed 1999). For a study of the impact of the Nuremberg trial on international law see THE NUREMBERG TRIAL AND INTERNATIONAL LAW (George Ginsburg & V.N. Kudriavtsev eds., 1990). See also *The Avalon Project at the Yale Law School* (last visited Mar. 24, 2000) <www.yale.edu/lawweb/avalon/imt/imt.htm> (online version of the Nuremberg documents).

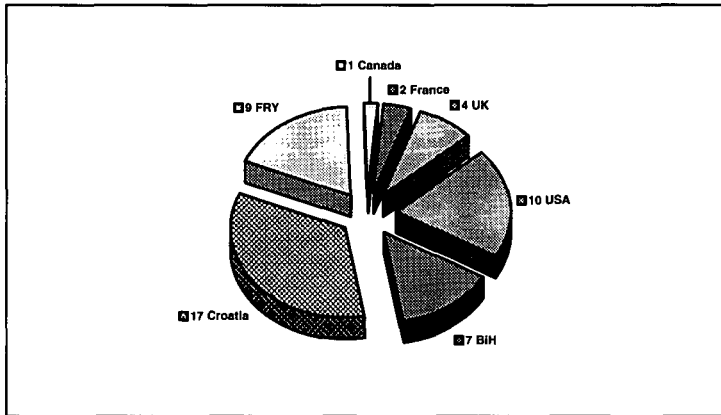
5. The Tokyo trial of Japanese war criminals was the Asian counterpart to the Nuremberg trial. For records of the proceedings see THE TOKYO MAJOR WAR CRIMES TRIAL, THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard ed. 1998). For further reference, an introduction, and an outline of the judgment, see R. John Pritchard, *International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia*, in 3 INTERNATIONAL CRIMINAL LAW 109-70 (Cherif Bassiouni ed., 2d ed 1999).

6. The two ad hoc tribunals are novel compared to Nuremberg and Tokyo in that they deal with war crimes and crimes against humanity on an ongoing basis. They will not be finished with their task in a comparably short time. They were created by the UN Security Council as an expression of a common stance of the international community. And they are not victors' tribunals, as none of the states involved in setting up the tribunals were directly involved in the underlying armed conflicts. As to the unique character of both Tribunals, see *The Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda of 11 November 1999*, U.N. Doc. No. A/54/634, paras. 22-25 (Nov. 22, 1999). The Report also expressly acknowledged the potential for delay through uncooperative defence conduct.

The prosecution's case is only one aspect of the trial process. There is also the defence. The common law adversarial system of criminal trials, which one

The variety of the national origins can be seen from Figure 1.

FIGURE 1
NATIONALITIES OF DEFENCE ATTORNEYS ACTING BEFORE THE
ICTY AS OF 29 OCTOBER 1999



PERCENTAGES:

| | | |
|--------------|-------------|----------------|
| BiH: 14% | Canada: 2% | UK: 8% |
| Croatia: 34% | France: 4% | USA: 20% |
| FRY: 18% | Others: 34% | Former YU: 66% |

Source: Dr. Christian Rohde, Chief of OLAD

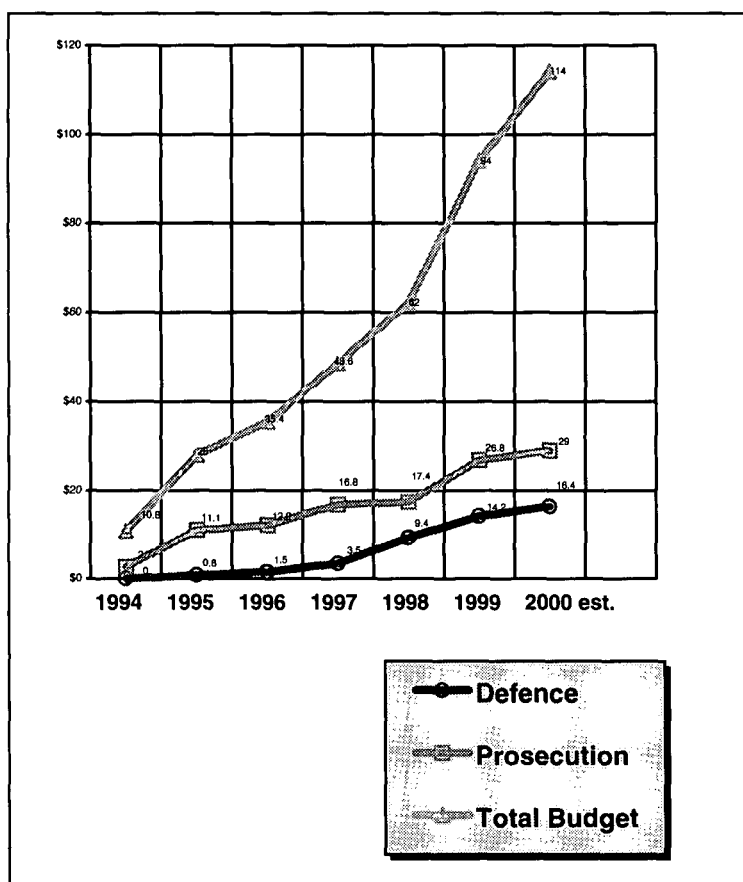
judge has described as more of a combat situation between two parties than the protection of international public order and its values under the control of the court, is largely reflected in the Statutes of the Tribunals and in their Rules of Procedure and Evidence. This, coupled with the presumption of innocence and the principles relating to self-incrimination, results in accused being uncooperative and insisting upon proof by the Prosecutor of every element of the crime alleged, as is the accused's right under both the Statutes and basic human rights law. From the standpoint of an accused, this represents optimum use of defence counsel. In turn, this reality is one of the factors contributing to the extensive nature of prosecutorial and defence investigations which often continue in distant places even after trials start and which have sometimes been conducted under precarious security conditions in locations still at war or gripped by the tensions of war. And this in itself leads to delays when there is hesitant or negative cooperation by the State involved. Moreover, it is not uncommon for the accused to believe that it is in their interest to engage in obstructive and dilatory tactics before and during trial. The crediting of detention time against the ultimate sentence may also bear on these tactics, along with the remuneration to defence counsel for legal services, which is only in small part paid on a lump-sum basis, and mainly on the basis of time spent.

Id. para. 67.

There is also an economic reason for having and enforcing a unified set of ethics that properly describes the functions of defence counsel, because the assignment of a variety of defence counsel from all over the

FIGURE 2

ICTY BUDGET AND PARTS DEVOTED TO DEFENCE
 AND PROSECUTION IN MILLION US \$



Source: Dr. Christian Rohde, Chief of OLAD

world increases ICTY's costs.⁷ However, these costs are relatively small in comparison to ICTY's overall costs as seen in Figure 2.

This Article presents an overview of the Codes⁸ and relevant Rules of Procedure and Evidence of the ICTY⁹ and the ICTR,¹⁰ as well as an analysis of their provisions. The ICTR's Code of Conduct¹¹ is almost identical to the ICTY's Code of Conduct.¹² Primarily, this Article examines ICTY law.¹³ This Article closes with an outlook on the future of criminal defence before international criminal tribunals. As of yet, there is no provision for the professional conduct of defence counsel before the International Criminal Court (ICC).¹⁴

7. Having counsel from different ethical backgrounds increases the likelihood of disputes over matters of professional conduct and ethics, thus increasing the potential for additional costs in staff time and resources in order to deal with the disputes. The diversity of origins of counsel already increases communication and travel costs as well as living expenses.

8. See generally OLAD MANUAL FOR PRACTITIONERS (1997). The OLAD produces a Manual for Practitioners, a useful compilation of information about the specific facts counsel appearing before the Tribunal may need to know. The current edition is the 1997 edition, but a new version is in preparation.

9. See ICTY Statute Rules of Procedure and Evidence, U.N. Doc IT/32 (March 14, 1994), *reprinted in* 33 I.L.M. 484 [hereinafter ICTY Rules].

10. See ICTR Statute, *supra* note 2, art. 14 (stating that the judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary) [hereinafter the ICTR Rules].

11. See Code of Professional Conduct for Defence Counsel (available at <www.ictor.org>) [hereinafter the ICTR Code of Professional Conduct].

12. See Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal, ICTY Doc. IT/125 (June 12, 1997), *reprinted in*, 37 I.L.M. 488 [hereinafter the ICTY Code of Professional Conduct].

13. To promote the development of a uniform jurisprudence, the ICTY Chief Prosecutor also serves as the ICTR Chief Prosecutor, and the ICTY Appeals Chamber also hears appeals from the ICTR trial chambers. For additional information on the jurisprudence of both the ICTY and the International Criminal Tribunal for Rwanda, see JOHN R. W. D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (2d ed. 1999); William Fenrick, *The Development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in 71 U.S. NAVAL WAR COLLEGE: INTERNATIONAL LAW STUDIES, *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* 77 (Michael Schmitt & Leslie Green eds., 1998); Faiza Patel King & Anne-Marie La Rosa, *The Jurisprudence of the Yugoslavia Tribunal: 1994-96*, 8 EUR. J. INT'L L. 123 (1997). Should a matter of law under the ICTR rules or Code be different or otherwise of importance, a reference to the ICTR provisions will be made in a footnote or in the text.

14. The Statute of the International Criminal Court, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute], was adopted in Rome on July 17, 1998, by a non-recorded vote of 120-7-21. Like the ICTY, the statute provides that the ICC will be based in The Hague. The statute is open for signature through December 31, 2000, and enters into force after 60 states deposit their instruments of ratification or accession. See

The ICTY statute makes explicit reference to the accused's right to counsel under article 21(4)(b) and (d).¹⁵ Rules 44-46 of the Rules of Procedure and Evidence (RPE)¹⁶ are based on the general premise that the accused must have access to and be represented by counsel of his own choice or may, in fact, be assigned counsel at the cost of the Tribunal if he is indigent.¹⁷

Based explicitly on Rules 44-46 of the RPE, the Registrar of the ICTY on 12 June 1997 promulgated the current Code of Professional Conduct (the "Code").¹⁸ It entered into force on the same date. Neither the Statute nor Rules 44-46 discuss anything regarding the Registrar's power to draw up and promulgate such a Code, but Rule 44(A) of the RPE implies that the Registrar¹⁹ is responsible for ensuring that only qualified practitioners are admitted to appear before the Tribunal. However, this is largely an academic matter, since the Judges of the Tribunal, in whom the general rule-making power is vested under article 15²⁰ of the Statute, were consulted before the promulgation and voiced no objections to the draft. Article 23 of the ICTY Code²¹ also empowers the Registrar to amend the Code only after prior consultation with the Judges.

It is also important to note that the law under Rules 44-46 and 77 of the RPE-ICTY²² regulates the consequences of attorney misconduct and contempt proceedings. Also, Rule 97 of the RPE²³ regulates the lawyer-client privilege. As the documentation on the drafting process by the Registrar and the Advisory Panel is confidential, it was not possible to examine the substantive debate regarding why the Code was shaped in this manner. However, comparing the provisions of the Code with the

generally THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., 1998); Christopher Keith Hall, *The Reports on the Preparatory Committee*, 91 AM. J. INT'L L. 177 (1997) & 92 AM. J. INT'L L. 124, 331, 548 (1998). The text of the ICC statute, as well as other information on the ICC, may also be found on the internet at <<http://www.un.org/icc>>.

15. ICTY Statute, *supra* note 1, arts. 21(4)(b), (d) (describing rights of the accused).

16. ICTY Rules, *supra* note 9, Rules 44-46.

17. See Directive on Assignment of Defence Counsel as amended 10 July 1998, Dir. No. 1/94 [IT/73/REV.6].

18. See ICTY Code of Professional Conduct, *supra* note 12.

19. The Registrar is Mrs. Dorothee de Sampayo Garrido-Nijgh, a Dutch judge.

20. See ICTY Statute, *supra* note 1, art. 15.

21. See *id.* art. 23.

22. See ICTY Rules, *supra* note 9, Rules 44-46.

23. See *id.* Rule 97.

American Bar Association Model Rules of Professional Conduct of 1997,²⁴ there is a clear indication that the ABA Rules extensively influenced the contents and even partially influenced the Code's wording. Therefore, the corresponding ABA rules are mentioned in footnotes to the Code's relevant provisions in the Appendices. The most important provisions of the ICTY and ICTR law are reproduced in Appendices I and II for easy reference.

II. THE RULES IN OUTLINE

A. Rule 44

Rule 44 contains basic provisions for counsel wishing to appear before the Tribunal.²⁵ Counsel is required to file his power of attorney with the Registrar at the earliest possible opportunity.²⁶ In order to be qualified to appear, the lawyers must demonstrate to the Registrar that they are admitted to the practice of law in a State, though not necessarily in their home country, or that they are university law professors.²⁷ The attorneys are subject to the relevant sections of ICTY legislation, especially to the ICTY Code of Conduct, and additionally to their respective domestic codes of practice and ethics in the performance of their duties before the Tribunal.²⁸ The Code of Conduct takes precedence over domestic codes.²⁹

B. Rule 45

Rule 45(A) makes it a criterion for counsel who wish to be assigned to indigent accused—rather than those who have been privately retained by the accused—to speak one of the two working languages of the Tribunal, namely English or French. Rule 45(B) relaxes this requirement for special cases, *i.e.*, where counsel speaks the language of the accused but none of the working languages of the Tribunal.³⁰ There is no

24. See MODEL RULES OF PROFESSIONAL CONDUCT (1998).

25. See ICTY Rules, *supra* note 9, Rule 44.

26. See *id.* Rule 44(A).

27. See *id.*

28. See *id.* Rule 44(B).

29. It would appear that the accused cannot demand the withdrawal of counsel unless he can show a conflict of interest or a dereliction of duties on the part of counsel. See *Prosecutor v. Delali} et al.*, Case No. IT-96-21-T (Apr. 21, 1997) (Trial Chamber II decision).

30. See *Prosecutor v. Erdemovic*, Case No. IT-95-18-I (May 28, 1996) (stating that exceptional reasons may be present when counsel has represented the accused before, possibly on the same charges but before a national court, and is therefore familiar with all the aspects of the case and has won the accused's confidence). Rule 3(D) additionally provides for the possibility of counsel requesting the Presiding Judge of a

requirement of a minimum level of professional experience in order to be added to the list of counsel for indigent accused.³¹

C. Rule 46

Rule 46, which has not yet been enforced against any attorney, empowers a Chamber to refuse audience to counsel who, after having been warned, act in an offensive, abusive, or otherwise obstructive manner.³² In effect, this involves what is commonly known as "courtroom decorum." The Chamber or a Judge may, subject to the approval of the President, inform the bar association or another body which governs the counsel's conduct, of the attorney's misconduct.³³ In the case of a professor advocate, who is not otherwise admitted to his domestic bar, the court may also inform the governing body of his or her university.³⁴

There is, however, no mention of whether the court or the Registrar are entitled to have a counsel's name struck from the Tribunal's list. This was, however, recently held to be the case by the Appeals Chamber of the ICTY in the contempt proceedings against Milan Vujin³⁵ Additionally, the Trial Chamber, in its decision of 14 March 2000, further stated that the Tribunal possessed an inherent power to deny audience to counsel beyond the boundaries of Rule 46, if the conduct of counsel showed that he was not "a fit and proper person to appear before the Tribunal."³⁶

D. Rule 77

Apart from Rule 46³⁷ there is another power vested in the Chamber

Chamber to use another language altogether. If leave to do so is granted, the costs of interpreting and translations may be borne partially or in total by the ICTY.

31. The ICTR demands 10 years' experience. See ICTR Rule, *supra* note 10, Rule 45(A).

32. See *id.* Rule 46(A).

33. See *id.* Rule 46(B).

34. See *id.*

35. See *Prosecutor v. Du{ko Tadi}*, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, Case. No. IT-94-1-A-R77 of 31 January 2000, para. 172.

36. See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Decision on the Request of the Accused Zoran Vukovic to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, Case No. IT-96-23-PT & IT-96-23/1-PT, paras. 13-17 (Mar. 14, 2000).

37. For a discussion of Rule 46, see *supra* Part II.C.

under Rule 77, that governs contempts.³⁸ This power needs to be examined somewhat more closely.

The concept of contempt of court which underlies the Rule of the Tribunal is the concept found in the Anglo-American context.³⁹ The power is held to be an *inherent* power, as expressly stated in Rule 77(E) which says that nothing in Rule 77 shall affect the inherent power to hold in contempt those who knowingly and willfully interfere with the court's administration of justice.⁴⁰ Thus, sub-rule (E) serves as a catch-all clause.⁴¹ Rule 77(H)(i) affects the penalty which may be imposed under sub-rule (E) and (A) by restricting the maximum to a term of imprisonment of twelve months and/or a fine not exceeding Dfl. 40.000, whereas the maximum for the more specific contempts under sub-rules (B)-(D) is seven years' imprisonment and/or a fine of up to Dfl. 200.000.⁴²

An attorney may run afoul of Rule 77 in different manners:

- under Rule 77(A)(ii), by disclosing information relating to the proceedings in known violation of an order of the Chamber, or under (iii) by failing to comply without just excuse with an order or to attend before or to produce documents before the Chamber;⁴³
- under Rule 77(B), by threatening, intimidating, offering bribes or causing injury to or otherwise interfering with witnesses or potential witnesses;⁴⁴
- under Rule 77(C), interfering as explained under Rule 77(B),⁴⁵ with any other person with the intention of preventing such person from complying with an order of the Judge or the Chamber.⁴⁶

Rule 77(D) clarifies that incitement and attempts to commit any of the acts mentioned in Rule 77(A)-(C)⁴⁷ are also punishable as contempts and the same penalties apply.⁴⁸ It is not clear whether Rule 77(D) also

38. See ICTY Rules, *supra* note 9, Rule 77.

39. For example, German law does not know of such a concept, and the German courts have no inherent power of sanctioning attorneys for contempt or other misconduct. Any sanction must be authorised by a special law; mainly, the relevant sections of the Criminal Code and the Court Organisation Act (Gerichtsverfassungsgesetz). See Michael Bohlander, *German Report*, in FREEDOM OF EXPRESSION AND THE CRITICISM OF JUDGES: A COMPARATIVE STUDY OF EUROPEAN LEGAL STANDARDS (Michael Addo ed., forthcoming).

40. See ICTY Rules, *supra* note 9, Rule 77(E).

41. See *id.*

42. See *id.* Rules 77(H)(i)-(ii).

43. See *id.* Rule 77(A)(ii).

44. See *id.* Rule 77(B).

45. See *id.* Rule 77(B).

46. See *id.* Rule 77(C).

47. See *id.* Rules 77(A)-(C).

48. See *id.* Rule 77(D).

applies to the inherent-power contempts under Rule 77(E), because sub-rule (E) does not name specific offences, but rather states that the court retains its inherent contempt power notwithstanding any conflicting language in Rule 77.⁴⁹ Using a systematic approach, one may also argue that since sub-rule (E) follows sub-rule (D), the latter only refers to the foregoing sub-rules (A)-(C).⁵⁰ On the other hand, sub-rule (H)(i) treats the offences under sub-rules (A) and (E) as equal in weight and penalty.⁵¹ Since the forms of misconduct mentioned under Rule 77(A)(i) and (iii) are commonly seen as acts which would also be covered by the inherent contempt power,⁵² it is difficult to see why these examples should fall under sub-rule (D),⁵³ but not those under the general ambit of sub-rule (E).⁵⁴

Rule 77(F) empowers the Chamber to initiate contempt proceedings *proprio motu* and issue a show-cause order.⁵⁵ However, the sub-rule does not require that the contemnor actually be heard, but only states that he must be *afforded an opportunity* to appear personally or answer by counsel. Thus, proceedings *in absentia* are in theory admissible under this Rule.⁵⁶ This could have disastrous consequences for the contemnor if the contempt was committed before the Appeals Chamber because after the last revision of Rule 77 on 17 December 1998, sub-rule (J)⁵⁷ was amended and now arguably grants the right of appeal only against decisions by a Trial Chamber. There is no provision governing a case where the contemnor did not appear, but had a just excuse for his absence. For example, there is no provision that provides for a re-hearing at the Trial nor the Appeals Chamber. Any appeal against a contempt citation by a Trial Chamber is, upon a showing of good cause, subject to a grant of leave by a bench of three Judges of the Appeals Chamber. Thus, an attorney could theoretically be sentenced *in absentia*

49. See *id.* Rule 77(E.).

50. See *id.* Rule 77(D).

51. See *id.* Rule 77(H)(i).

52. See *id.* Rule 77(A)(i).

53. See *id.* Rule 77(D).

54. See *id.* Rule 77(E).

55. See *id.* Rule 77(F).

56. See *Prosecutor v. Tihomir Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR 108 bis (Oct. 29, 1997) (the so-called "Blaškić Subpoena Decision" of the Appeals Chamber) (stating that "proceedings in absentia may be exceptionally warranted . . . where the person charged fails to appear in court, thus obstructing the administration of justice").

57. See ICTY Rules, *supra* note 9, Rule 77(F).

to a prison term of 7 years and/or a fine of Dfl. 200.000 by the Appeals Chamber, de facto sitting⁵⁸ as a court of *first instance* in the contempt proceeding, without any possibility of an appeal or right to a re-hearing.

This provision, like the one on false testimony under Rule 91,⁵⁹ becomes even more problematic when one looks at the question of whether the Judges actually have the power to create new substantive offences not mentioned under the Statute.⁶⁰ Article 15 of the Statute states: “[R]ules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.”⁶¹ This language thus follows the Secretary-General’s words in his Report of 3 May 1993.⁶²

As to the adoption of the inherent-power principle, the former President Antonio Cassese stated in the *Decision of the President on the Prosecutor’s Motion for the Production of Notes Exchanged Between Zejnil Delali} and Zdravko Muci}* of 11 November 1996, *obiter dicto*:⁶³ “The Judges acting in plenary had the authority to adopt a rule on contempt only by virtue of this inherent power. . . .”

As stated above, the inherent-power principle is an Anglo-American doctrinal approach not shared by many of the “civil law systems,” that require a statute-like provision. It is also questionable whether the doctrine of “implied powers” under international law could be used to create a *criminal offence* with such draconian penalties. However, it is not the aim of this Article to examine this question of international public law.

58. It is also interesting to note that unlike under Rule 91(D), the rule governing false testimony under solemn declaration, the Judges before whom the contempt has been committed are not excluded from hearing the contempt case, as is made clear by Rule 77(F).

59. See ICTY Rules, *supra* note 9, Rule 91.

60. This concern is shared by André Klip, *Witnesses Before the International Criminal Tribunal for the Former Yugoslavia*, 67 REVUE INTERNATIONALE DE DROIT PÉNAL, 267, 276-77 (1996). Klip considers Rules 77 and 91 to be *ultra vires* with regard to the rule-making power under article 15 of the ICTY Statute.

61. See ICTY Statute, *supra* note 1, art. 15.

62. Secretary-General’s Report, U.N. Doc. S/25704, at 21-22 (1993). Although Rule 77 had already been implemented in 1995, the Tribunal’s Annual Report of 16 August 1996 submitted to the General Assembly of the UN by the Secretary-General, and the following ones do not mention this important development. Only in the Annual Report of 10 August 1998 is Rule 77 mentioned, and then only by mere reference. Rule 91 is not mentioned at all in any report. It appears that the creation of new criminal offences like Rule 91 and, if one does not subscribe to the inherent-power doctrine, also Rule 77—which admittedly are related to protecting the administration of justice in the proceedings before the Tribunal and thus arguably justifiable in their substance—is subsumed under the heading of “other appropriate matters” and not perceived to be a problem.

63. See *Prosecutor v. Delali} et al.*, Case No. IT-96-21-T (Nov. 11, 1996).

It is, however, interesting to note that the future permanent International Criminal Court (ICC) has been explicitly empowered in articles 70 and 71 of its Statute to impose similar sanctions. But, the ICC sanctions are inferior to those created by the Judges of the ICTY.⁶⁴

64. See ICC Statute, *supra* note 14, arts. 70-71. The provisions read as follows:

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;
- (f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

- 4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
- (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and

A striking feature of the ICC law is that there is no reference to the inherent-power doctrine being a catch-all clause. The lack of a reference might indicate a solution to whether the inherent-power doctrine for the punishment of contempt represents the settled custom of an overwhelming majority of states, or represents a general principle of law.

Also, if one examines the corresponding Rule 77 of the ICTR in the form of the amended version of the Rules of 21 February 2000,⁶⁵ which is the first ICTR version, the ICTR Chambers may only sanction cases that include the refusal of a witness to testify and witness tampering. The sanctions may include a fine of not more than \$10,000 U.S. or imprisonment of not more than six months.⁶⁶

Similarly, there is no catch-all provision under the inherent-power principle in the ICTR Statute. This is even more surprising because article 14 of the ICTR Statute expressly states that the ICTR shall adopt the Rules of the ICTY with such changes as the Judges deem necessary. Again, as mentioned earlier, it was not possible to delve into the background plenary minutes for reasons of confidentiality.

André Klip, in his article on witnesses before the Tribunal, raises the concern that the Tribunal only has the power to prosecute so-called “war crimes.”⁶⁷ He argues that the mandate of the Tribunal, with all the ensuing duties of the States, derives from the Security Council and the ambit of that mandate is found in article 1 of the Statute. Nothing in the Statute explicitly empowers the Judges to rule on criminal offences, which are not war crimes.

Another problem is whether the ICTY could require States in which a contemnor is residing to enforce any decisions taken under Rule 77 and to co-operate with the Prosecutor in the case of Rule 91(B). One could imagine that States would refuse to assist the Tribunal in any matter regarding proceedings under Rules 77 and 91 on the basis that they do not fall under the jurisdiction of the ICTY and thus not even under the States’ general duty to co-operate apart from article 29.⁶⁸

Evidence.

Id.

65. See ICTR Rules, *supra* note 10, Rule 77 (amendment Feb. 21, 2000).

66. See *id.*

67. 67 REVUE INTERNATIONALE DE DROIT PÉNAL 267, 276-77 (1996).

68. One may also argue against the inclusion of a power of that magnitude and especially the provision under Rule 77(F) (requiring merely an opportunity to appear) on the basis of article 21(4)(d) of the Statute as the sole expression of the Security Council mandate. The Statute requires that trials be held in the presence of the accused. Rule 77(F) does not require that. But, if Rule 77 contains a criminal offence, then one might say that the contemnor should be treated as an accused in the material sense, no matter what the terminology of the Rules is. If the Tribunal is already going beyond its express mandate under article 1 on the grounds of inherent power, then those inherent power

ICTY Rule 77⁶⁹ has been applied against Counsel Nobile for disclosing the name of a protected witness.⁷⁰ The Appeals Chamber discussed the contempt problem in its judgement against Milan Vujin, the former lawyer of Du{ko Tadi} of 31 January 2000.⁷¹ The Chamber repeated that the basis for the sanctions was in the inherent power of the Tribunal, and attempted an analysis of the different approaches in the common law and civil law systems.⁷² The court stated:

13. There is no mention in the Tribunal's Statute of its power to deal with contempt. The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice. The content of that inherent power

offences cannot have less effective safeguards than those mentioned expressly under the Statute. Rule 77(F) may thus be ultra vires because it restricts the accused's right to be tried in his presence by facilitating criminal proceedings *in absentia*.

69. For a discussion on Rule 77, see *supra* Part II.D.

70. On 11 December 1998, the Trial Chamber in the *Aleksovski* case imposed on Mr. Anto Nobile a fine of 10,000 guilders for contempt of the Tribunal. Mr. Nobile was one of the lawyers for Bla{ki}. In September he had disclosed the identity and occupation of a protected witness in the *Aleksovski* trial. Subsequently, the Prosecution had lodged a complaint alleging that the witness protection order had been violated. Mr. Nobile did not contest the facts of the allegation, but argued that he had been unaware of the protective order. On 20 November, the Chamber heard the arguments of the parties in closed session. With regard to sub-rules 77(A)(iii) and (v) the question was whether Mr. Nobile was in "knowing" violation. The Chamber was of the opinion that decisions regarding the protection of witnesses are of great importance for the functioning of the Tribunal. Therefore, counsel must take all necessary measures to guarantee the absolute respect of protective measures for witnesses. An "in knowing violation" is not only a deliberate violation, but also a "deliberate abstention from checking the circumstances" under which a witness has given evidence. The Trial Chamber considered that the violation was serious and unnecessary, and that it had been committed by an experienced professional; on the other hand, the Trial Chamber also considered that it was counsel's first violation and he had committed himself not to do it again. Mr. Nobile was fined 10,000 guilders: 4,000 guilders to be paid within seven days, and 6,000 guilders only to be paid if, within a period of a year, he was found to be in contempt of the Tribunal again. See *Prosecutor v. Zlatko Aleksovski*, Finding of Contempt of Trial Chamber I, Case No. IT-95-14/1-T (Dec. 11, 1998), Nobile has appealed the order. See *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Appeals Chamber Decision on Application of Mr. Nobile for Leave to Appeal the Trial Chamber Finding of Contempt (Dec. 22, 1998). At the time this Article was written, the Appeals Chamber had not yet reached a decision.

71. See *Prosecutor v. Milan Vujin*, No. IT-94-1-A-R77, paras. 12-28 ("Judgment on Allegations of Contempt Against Prior Counsel").

72. See *id.* at n.20. The court made reference to the laws of Germany, China, France and Russia. The court mentioned the parallels which exist with respect to some of the offence types, but no discussion of the applicable penalty range took place.

may be discerned by reference to the usual sources of international law.

14. There is no specific customary international law directly applicable to this issue. There is an international analogue available, by way of conventional international law, in the Charter of the International Military Tribunal . . . which gave to that tribunal the power to deal summarily with “any contumacy” by “imposing appropriate punishment

15. It is . . . of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined . . . in international jurisprudence. Historically, the law of contempt originated as, and has remained, a creature of the common law. The general concept of contempt is said to be unknown to the civil law, but many civil law systems have legislated to provide offences which produce a similar result⁷³

The Chamber went on to state that the rule-making power did not allow the Judges to create new criminal offences:

24. Care must be taken not to treat the considerable amount of elaboration which has occurred in relation to Rule 77 . . . as if it has produced a statutory form of offence enacted by the judges of the Tribunal. . . . Article 15 of the Tribunal’s Statute gives power to the judges to adopt only . . . rules of procedure and evidence That power does not permit rules to be adopted which constitute new offences, but it does permit the judges to adopt rules of procedure and evidence for the conduct of matters falling within the inherent jurisdiction of the Tribunal as well as matters within its statutory jurisdiction. As stated earlier, the content of these inherent powers may be discerned by reference to the usual sources of international law, but not by reference to the wording of the rule.⁷⁴

According to this decision, the Judges have no power to create new offences themselves. But, the Appeals Chamber did not fully explain the contents of the contempt power: *i.e.*, why—beyond the traditional necessity doctrine—the inherent contempt powers encompass punishment at all, and how the drastic increase in the sentencing frames over a few years can be deduced from the usual sources of international law.

E. Rule 97

Rule 97 covers the attorney-client privilege.⁷⁵ Essentially, all communications between counsel and the accused are privileged and do not fall under the disclosure provisions unless the client has waived the privilege or has previously disclosed such information voluntarily to a third person, who may then be called to testify.⁷⁶ As a corollary, Rule 70(A) makes it clear that internal documents like memoranda and reports prepared by the accused or counsel for the investigation or preparation

73. *See id.* paras. 13-15.

74. *See id.* para. 24.

75. *See* ICTY Rules, *supra* note 9, Rule 97.

76. *See id.*

of the case are not subject to the reciprocal disclosure under Rules 66 and 67.⁷⁷

III. THE CODE IN OUTLINE

A. *The Decision of the Registrar*

In making her decision, the Registrar stated that being subject to a Code of Conduct was an essential attribute of being qualified as counsel, and that all counsel appearing before the Tribunal should be subject to the same Code.⁷⁸ In preparing the Code, the Registrar and the Advisory Panel had examined more than eleven different codes, statutes or regulations, including those from Australia, Belgium, Bosnia & Herzegovina, England, the European Community, France, the *International Association of Penal Law*, the *International Commission of Jurists*, the Netherlands, Spain, the *Union Internationale des Avocats* and the United States.⁷⁹

B. *The Preamble and the Preliminary*

The Preamble voices the general maxim: legal practitioners must maintain a high standard of professional conduct; they must act honestly, fairly, skillfully, diligently and courageously.⁸⁰ Legal practitioners have an overriding duty to defend their client's interests, subject to the limitation that they must not act dishonestly or improperly prejudice the administration of justice.⁸¹

The Preliminary is basically a series of definitions of often-used terms such as "client" or "counsel."⁸² However, it also contains a few fundamental provisions on the interpretation of the Code. Sub-paragraph (2) gives the "Directive on Assignment of Defence Counsel" overriding power, if there is any conflict between the Code and the

77. See *id.* Rule 70(A). "Rule 70(A) states that, notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants, or representatives, in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules." *Id.*

78. See ICTY Code of Professional Conduct, *supra* note 12, Decision of the Registrar.

79. See *id.*

80. See *id.* preamble paras. 1-2.

81. See *id.* preamble para. 3.

82. See *id.* art. 1.

Directive.⁸³ Sub-paragraph (3) takes over the definitions from the RPE insofar as the Code contains no specific definitions.⁸⁴ Sub-paragraph (4) contains the important principle: the Code is not a conclusive and definitive statement on the duties of counsel; the Tribunal's inherent jurisdiction and counsel's national Codes of Professional Ethics may impose additional standards and requirements.⁸⁵ Sub-paragraphs (5) and (6) make it clear that the interpretation of the Code should be guided by the aim of giving the greatest effect to the "objects and values" of the Preamble, and that the general rules of the Code should not be construed restrictively on account of particular or illustrative provisions.⁸⁶

C. General Obligations to Clients

Article 4 regulates the scope and termination of representation. It imposes an ongoing duty to advise and represent the client unless the latter ends the mandate, or counsel is otherwise withdrawn with the Tribunal's consent.⁸⁷ Counsel must abide by the client's decisions as to how his defence is to be presented, unless that would collide with counsel's ethical duties, and he must consult with the client regarding defense strategy.⁸⁸ Counsel must not advise or assist a client to engage in conduct which would run counter to the Statute, the Rules, the Code or the Directive on Assignment of Defence Counsel.⁸⁹

Article 5 repeats the statement that counsel shall basically act honestly and diligently and retain his independence of professional judgement in the face of pressure from the client or other external sources.⁹⁰

Article 6 repeats the essence of articles 4 and 5 as to diligence and ongoing duty to represent,⁹¹ whereas article 7 imposes an ongoing duty to keep the client informed of the status of the matter before the Tribunal.⁹²

Article 8 deals with the general regime of confidentiality under which no information gained during the attorney-client relationship may be disclosed,⁹³ unless:

- the client knowingly consents after full consultation on the

83. *See id.* art. 1(2).

84. *See id.* art. 1(3).

85. *See id.* art. 1(4).

86. *See id.*

87. *See id.* art. 4(1).

88. *See id.* arts. 4(2)(a), (b).

89. *See id.* art. 4(3).

90. *See id.* arts. 5(a)-(e).

91. *See id.* art. 6.

92. *See id.* art. 7.

93. *See id.* art. 8(1).

issue,⁹⁴

- the client has voluntarily disclosed the communication to a third party who subsequently gives evidence about it,⁹⁵
- the information is essential for counsel to defend himself against formally instituted criminal, disciplinary or civil proceedings,⁹⁶ or
- this is necessary to prevent an act which counsel reasonably believes will be a criminal offence within the territory in which it is committed, or under the Statute or the Rules, *and* which may result in death or substantial bodily harm to any person.⁹⁷

Article 8(3) extends these duties to all persons whose services are used by counsel, such as employees, associates, and investigators.⁹⁸

Article 9 states the familiar prohibition against representation of a client when there is a conflict of interest⁹⁹, mainly for the reasons of: third-party involvement;¹⁰⁰ counsel's own financial; business; property or personal interests;¹⁰¹ and substantial relation to a previous matter in which the lawyer had represented another person and the interests of the new client are materially adverse to those of the former.¹⁰² The former client can waive this inhibition.¹⁰³ Counsel is also forbidden, save with the consent of his client, to accept payment for the case from another source apart from his client or the Tribunal.¹⁰⁴ When a conflict of interest comes to the knowledge of counsel, he must inform each potentially affected client promptly and fully and take all necessary steps to solve the conflict or obtain the consent of all potentially affected parties to continue the representation.¹⁰⁵

Article 10 discusses the special duties arising for an attorney from the fact that his client may be impaired in making adequately considered decisions with respect to his representation because of his age, mental

94. *See id.* art. 8(2)(a).

95. *See id.* art. 8(2)(b).

96. *See id.* art. 8(2)(c).

97. *See id.* arts. 8(2)(d)(i)-(iii).

98. *See id.* art. 8(3).

99. *See id.* art. 9(2).

100. *See id.* art. 9(3)(c)(i).

101. *See id.* art. 9(3)(c)(ii).

102. *See id.* art. 9(3)(c)(iii).

103. *See id.* art. 5(b)(ii).

104. *See id.* art. 9(4).

105. *See id.* arts. 9(5)(b)(i)-(ii).

disabilities or other reasons.¹⁰⁶

Article 11 demands that counsel should keep detailed records of his activities in the case.¹⁰⁷

D. Conduct Before the Tribunal

Article 12 states the general obligation of counsel to abide by the RPE and other rulings as to conduct and procedure, and to respect the fair conduct of proceedings.¹⁰⁸ *Ex parte* communications with the Judges are forbidden, unless there are specific exceptions in the RPE.¹⁰⁹

Article 13 makes it counsel's duty to exercise his own judgement upon the substance and purpose of the statements made and the questions asked; he is personally responsible for the presentation and conduct of the client's case.¹¹⁰ Counsel must refrain from knowingly making false statements of material fact or from offering evidence which he knows is incorrect.¹¹¹ Article 13(3) clarifies the problem whether counsel can be deemed to have made an incorrect statement and be held responsible for not clarifying an error on a matter stated to him or the court in the proceedings by stating that he cannot.¹¹² Previously incorrect statements unknowingly made by counsel must be rectified to the best of counsel's abilities as soon as possible after the attorney learns that the statement is incorrect.¹¹³

Article 14 forbids the tampering with and spoliation of (potential) evidence.¹¹⁴ Article 15 imposes on counsel a duty to respect the impartiality of the Tribunal by taking all necessary steps in order to avoid bringing the proceedings into disrepute or by unduly influencing judges or other officials.¹¹⁵ Article 16 forbids counsel to appear as a lawyer in a case where he is likely to be a necessary witness, unless the issue is uncontested or it would cause the client substantial hardship.¹¹⁶

E. Duties of Counsel to Others

Article 17 commands counsel to respect all other attorneys as professional colleagues, and to act fairly, honestly and courteously

106. *See id.* arts. 10(a)-(c).

107. *See id.* art. 11.

108. *See id.* art. 12(1).

109. *See id.* arts. 12(2)(a)-(b).

110. *See id.* art. 13(1).

111. *See id.* arts. 13(2)(a)-(b).

112. *See id.* art. 13(3).

113. *See id.* art. 13(4).

114. *See id.* art. 14.

115. *See id.* arts. 15(1)-(2).

116. *See id.* art. 16.

towards them and their clients, and not to communicate with other clients directly without the permission of counsel of those clients.¹¹⁷

Article 18 governs the treatment of unrepresented persons. Article 18 states that counsel must not render advice to such persons if there is a risk of conflict of interests with his own client, except that counsel may advise the person to secure legal advice.¹¹⁸ In any case, counsel must inform the unrepresented person about counsel's role and the nature of legal representation as well as the person's right to counsel under the RPE.¹¹⁹

F. Maintaining the Integrity of the Profession

Article 19 contains the general rule that the ICTY Code shall prevail in any conflict between it and a national code of professional responsibility.¹²⁰

Article 20 lists several kinds of misconduct, namely:

- violating or attempting to violate the Code or knowingly assisting or inducing another person to do so, or doing so through the acts of another person,¹²¹
- committing a criminal act which reflects adversely on Counsel's honesty, trustworthiness or fitness as Counsel,¹²²
- engaging in conduct involving dishonesty, fraud, deceit or misrepresentation,¹²³
- engaging in conduct which is prejudicial to the proper administration of justice before the Tribunal,¹²⁴ or
- attempting to influence an officer of the Tribunal in an improper manner.¹²⁵

Article 21 gives counsel the *right* to inform the court of any attorney's serious misconduct if such misconduct raises a substantial question as to the offending lawyer's honesty, trustworthiness and professional

117. *See id.* arts. 17(1)-(2).

118. *See id.* arts. 18(1)(a)-(b).

119. *See id.* art. 18(2).

120. *See id.* art. 19.

121. *See id.* art. 20(a).

122. *See id.* art. 20(b).

123. *See id.* art. 20(c).

124. *See id.* art. 20(d).

125. *See id.* art. 20(e).

fitness.¹²⁶ Unlike the American rule under the American Bar Association Model Rules of Professional Conduct, Rule 8.3,¹²⁷ there is no duty imposed on counsel to “blow the whistle” on his or her colleagues. Article 22 requires all counsel to submit voluntarily and abide by any disciplinary and enforcement procedures established by the Tribunal under the Rules.¹²⁸

IV. EVALUATION OF THE CODE OF CONDUCT AND THE RPE

It is hardly surprising that the concept of lawyering underlying the ICTY Code and Rules, as well as that of the ICTR, is a distinctly common-law driven approach.¹²⁹ This is especially clear with regard to the Tribunal’s sanctioning powers under Rule 77,¹³⁰ and has a direct influence on the wording of some of the provisions when compared to the ABA Model Rules. Given the fact that not all members of the United Nations subscribe to that kind of approach (*i.e.*, the civil law jurisdictions), one might be inclined to blame the common-law community for imposing a legal *octroi* on the civil-law countries. However, one has to bear in mind that the Security Council at that time, and subsequently the Registrar, had to move quickly, and that finding a common ground would in all likelihood have taken just as long as the negotiations for the ICC Statute. The Statute basically created an adversarial system, and it is thus only natural that the code of conduct for this tribunal should share the same nature. It was thus probably more a matter of who first had a passably working set of rules. This is, anyway, only a criticism by way of principle. It does not mean that the Code is not working in the Tribunal’s everyday practice. On the contrary: at least as far as public record information is concerned, the Code seems to work reasonably well. It remains yet to be seen what influences the ICTY and ICTR experience will have on the treaty-based

126. See *id.* arts. 21(1)(a)-(b).

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1998) (“A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority.”) (emphasis added).

128. See ICTY Code of Professional Conduct, *supra* note 12, art. 22.

129. The influence of common law thinking is a simple result from the relative predominance of jurists coming from those jurisdictions within the UN system. It is also a natural consequence of the more or less adversarial structure of the trial under the Tribunals’ Statutes and Rules of Procedure and Evidence, which lend themselves much more naturally to a common law adversarial approach to interpretation and construction of underlying general principles of law than to approaches based on the so-called “inquisitorial” approach of civil law jurisdictions.

130. See *supra* Part II.D.

ICC's future Codes of Conduct.

V. THE FUTURE OF DEFENCE ETHICS IN THE INTERNATIONAL CRIMINAL COURT

There is no provision in the Statute of the ICC that specifically details how the law of professional conduct should be regulated with respect to defence attorneys appearing before that court. The International Criminal Defence Attorneys Association (ICDAA) unsuccessfully argued for the implementation of an independent Office of the Defence in the Rome Statute itself, which would have possessed the same or similar diplomatic status and powers as the Office of the Prosecutor.¹³¹ The ICDAA stated in its summary: "The International Criminal Defence Attorneys Association (ICDAA) recommends the creation of an Office of the Defence that can address the issues unique to the defence of the accused persons who will appear before the ICC."

This ICDAA position paper proposes the creation of an Office of the Defence similar to the Office of the Prosecutor to assist defence attorneys practising before the International Criminal Court. The primary purpose of this office is to ensure Defence independence. At a practical level, Defence independence means ensuring that a body independent of the Court and of the Office of the Prosecutor deals with such issues as: the choice of attorneys, professional qualifications, ethics and training, as well as confidentiality, professional secrecy and adequate resources for case preparation.

After the Rome Conference failed to take up the initiative, the German, French, Dutch and Canadian delegations to the Preparatory Commission for the Rules of Procedure and Evidence of the ICC submitted a joint proposal to the Commission in which they argued for the creation of an independent office—within the sphere of the ICC's Registry pursuant to article 43 of the Statute.¹³²

In June 1999 the ICDAA also submitted a proposal for the Establishment of a Commission of Defence Counsel, which was to serve as an advisory panel with respect to ethics complaints against defence

131. *Proposal for the Establishment of an Independent Office of the Defence of 21 June 1998* (last visited Mar. 24, 2000) <<http://www.hri.ca/partners/aiadicdaa/reports/proposal-iod.htm>>.

132. Revised Proposal to create a Defence Unit submitted to Preparatory Commission on 10 August 1999, U.N. Doc. PCNICC/1999/WGRPE(4)/DP.2/Rev.1, August 6, 1999.

counsel.¹³³ In its draft Rule III(b)(iv), the Commission is charged with participating “in the development of a Code of Professional Conduct and Disciplinary Procedure.”¹³⁴ The ICDAAC also wished to subject defence counsel and the Prosecution’s trial attorneys to the same set of ethical rules.¹³⁵

It is open to question whether the creation of a financially independent Office of the Defence, under the umbrella of the Registry of the ICC, is a viable option. If the Office was created within the Registry, then it would have to be under the supervision of the Registrar, who is responsible for the personnel and the budget. Giving the Defence Office independence with respect to these two factors would mean the de facto creation of a fourth primary organ of the ICC not provided for in the Statute. Considering common opinion with regard to the possibility of changing the Statute through the Rules of Procedure and Evidence, it appears that such a possibility does not exist and the defence lobby will face formidable resistance.

A common code of ethical conduct for both defence counsel and prosecutors is also imaginable, albeit with some specifications because defence counsel and prosecutor duties differ in some respects. However, the bodies enforcing that code will by structural and organisational necessity have to be different, unless one would give the Judges the disciplinary power over both. However, this does not appear to be the general intention at the moment, and would create difficulties in day-to-day practice.

Regardless of the future manner of creating a future code of professional conduct and discipline, any parties concerned will be well advised to listen to the defence bar’s experience.

133. *Draft Proposal for the Establishment of a Commission of Defence Counsel for the International Criminal Court (or Delegation of Defence Counsel to the International Criminal Court) and of an Office of the Defence within the International Criminal Court*, in CONFERENCE PAPERS OF THE ICDAAC CONFERENCE ON THE INDEPENDENT DEFENCE App. 4 (Conference held before the ICTY on 1 & 2 Nov. 1999) (not yet available on the ICDAAC web site, but on file with the author).

134. *Id.* Rule III(b)(iv).

135. *Briefing Paper on Establishing an Office of the Defence*, 18 February 1999 (visited Mar. 24, 2000) <www.hri.ca/partners/aiad-icdaa/reports/position.htm>.

APPENDIX I

CODE OF PROFESSIONAL CONDUCT FOR DEFENCE COUNSEL APPEARING BEFORE THE INTERNATIONAL TRIBUNAL

PREAMBLE

This Code is made in the belief that:

- (1) As legal practitioners, Counsel must maintain high standards of professional conduct.
- (2) The role of Counsel as specialist advocates in the administration of justice requires them to act honestly, fairly, skillfully, diligently and courageously.
- (3) Counsel have an overriding duty to defend their client's interests, to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice.
- (4) Counsel may be subject to disciplinary proceedings under Rule 46 of the Rules of Procedure and Evidence of the Tribunal. It is therefore necessary that Counsel be aware of their rights and obligations toward the Tribunal.

To these ends, this Code and its Articles of conduct have been formulated.

PRELIMINARY

Article 1 Definitions

- (1) In this Code, unless a different interpretation is required by the provisions of the Code or the context in which they appear, the following terms shall mean:
 - “Client” an Accused, Suspect, Detainee, Witness or other Person who has engaged Counsel for the purposes of his legal representation before the Tribunal.
 - “Counsel” any person who has satisfied the Registrar that he is admitted to the practice of law in a State, or is a University professor of law, and
 - (a) has filed his or her power of attorney with the Registrar; or
 - (b) has been assigned under the Rules to a Suspect, Accused,

Detainee, Witness or other Person.

Any reference to Counsel includes a reference to any co-counsel jointly and to each of them severally.

“Directive” the directive entitled “Directive on Assignment of Defence Counsel”. This is Directive No. 1/94 (UN Doc IT/73/REV.4) as amended.¹³⁶

“Rules” means the Rules of Procedure and Evidence of the Tribunal adopted on 11 February 1994, as amended.¹³⁷

“Statute” the Statute of the Tribunal adopted by Security Council resolution 827 of 25 May 1993.

“Tribunal” the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993.¹³⁸

- (2) In the event of any inconsistency between this Code and the Directive, the terms and provisions of the Directive prevail.
- (3) Any term not defined in this Code has the same meaning given to it by the Statute or by the Rules.
- (4) While Counsel is bound by this Code, it is not, and should not be read as if it were, a complete or detailed code of conduct for Counsel. Other standards and requirements may be imposed on the conduct of Counsel by virtue of the Tribunal’s inherent jurisdiction and the code of conduct of any national body to which Counsel belongs.
- (5) This Code must be read and applied so as to most effectively attain the objects and uphold the values expressed in the Preamble.
- (6) General provisions of this Code should not be read or applied in a restrictive way by reason of any particular or illustrative provisions.

136. ICTR: Directive entitled Directive on Assignment of Defence Counsel. This is Directive No. 1/96 (ICTR/2/L.2) as amended. Throughout these Appendices, the footnotes will relate any differences between the ICTY, discussed in the text, and the ICTR and ABA Rules of Professional Conduct. The footnotes, therefore, have been simplified in form for this purpose.

137. ICTR: Adopted on 5 July 1995

138. ICTR: The Statute of the Tribunal adopted by Security Council resolution 955 of 8 November 1994.

The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council Resolution 955 of 8 November 1994.

- (7) The singular includes the plural and vice versa.

Article 2

Entry into Force

This Code enters into force on 12 June 1997.¹³⁹

Article 3

General Purpose and Application

- (1) The general purpose of this Code is to provide for standards of conduct on the part of Counsel which are appropriate in the interests of the fair and proper administration of justice.
- (2) This Code applies to Counsel as defined in Article 1(1) of this Code.

GENERAL OBLIGATIONS OF COUNSEL TO CLIENTS

Article 4¹⁴⁰

Scope and Termination of Representation

139. ICTR: 4 June 1998.

140. Compare ABA Rule 1.2, which reads:

Rule 1.2 SCOPE OF REPRESENTATION

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the objectives of the representation if the client consents after consultation.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

- (1) Counsel must advise and represent their Client until the Client duly terminates that Counsel's position, or the Counsel is otherwise withdrawn with the consent of the Tribunal.
- (2) When representing a Client, Counsel must:
 - (a) abide by a Client's decisions concerning the objectives of representation if not inconsistent with Counsel's ethical duties; and
 - (b) consult with the Client about the means by which those objectives are to be pursued.
- (3) Counsel must not advise or assist a Client to engage in conduct which Counsel knows is in breach of the Statute, the Rules or this Code and, where Counsel has been assigned to the Client, the Directive.

Article 5

Competence and Independence

In providing representation to a Client, Counsel must:

- (a) act with competence, skill, care, honesty and loyalty;
- (b) exercise independent professional judgement and render open and honest advice;
- (c) never be influenced by improper or patently dishonest behaviour on the part of a Client;
- (d) preserve their own integrity and that of the legal profession as a whole;
- (e) never permit their independence, integrity and standards to be compromised by external pressures.

Article 6

Diligence

Counsel must represent a Client diligently in order to protect the Client's best interests. Unless the representation is terminated, Counsel must carry through to conclusion all matters undertaken for a Client within the scope of his legal representation.

Article 7¹⁴¹
Communication

Counsel must keep a Client informed about the status of a matter before the Tribunal in which the Client is an interested party and must promptly comply with all reasonable requests for information.

Article 8¹⁴²
Confidentiality

- (1) Whether or not the relation of Counsel and client continues, Counsel must preserve the confidentiality of his client's affairs and, subject to sub-article (2), must not reveal to any other person, other than to any assistants who need to know it for the performance of their duties, information which has been entrusted to him in confidence or use such information to his client's detriment or to his own or another client's advantage.
- (2) Notwithstanding sub-article (1), and subject to Article 19 ("Conflicts"), Counsel may reveal information which has been entrusted to him in confidence in any one of the following circumstances:

141. Compare ABA Rule 1.4 which reads:

Rule 1.4 COMMUNICATION

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

142. Compare ABA Rule 1.6:

Rule 1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

- (a) when the Client has been fully consulted and knowingly consents; or
 - (b) when the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure; or
 - (c) when essential to establish a defence to a criminal or disciplinary charge or civil claim formally instituted against Counsel; or
 - (d) to prevent an act which Counsel reasonably believes:
 - (i) is, or may be, criminal within the territory in which it may occur or under the Statute or the Rules; and
 - (ii) may result in death or substantial bodily harm to any person unless the information is disclosed.
- (3) For the purposes of this Article, Counsel includes employees or associates of Counsel and all others whose services are used by Counsel.

Article 9 ¹⁴³

143. Compare ABA Rules 1.7 and 1.9:

Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent his clients if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of

Conflict of Interest

- (1) Counsel owes a duty of loyalty to his or her Client. Counsel must at all times act in the best interests of the Client and must put those interests before their own interests or those of any other person.
- (2) In the course of representing a Client, Counsel must exercise all care to ensure that no conflict of interest arises.
- (3) Without limiting the generality of sub-articles (1) and (2), Counsel must not represent a Client with respect to a matter if:
 - (a) such representation will be or is likely to be adversely affected by representation of another Client;
 - (b) representation of another Client will be or is likely to be adversely affected by such representation;
 - (c) the Counsel's professional judgement on behalf of the Client will be, or may reasonably be expected to be, adversely affected by:
 - (i) the Counsel's responsibilities to, or interests in, a third party; or
 - (ii) the Counsel's own financial, business, property or personal interests; or
 - (iii) the matter is the same or substantially related to another matter in which Counsel had formerly represented another client ("the former client"), and the interests of the Client are materially adverse to the interests of the former client, unless the former client consents after consultation.
- (4) Counsel must not accept compensation for representing a Client from a source other than that Client or, if assigned by the Tribunal, from a source other than the Tribunal, unless:
 - (a) that Client consents after consultation; and
 - (b) there is no interference thereby with the Counsel's independence of professional judgement nor with the Client-Counsel relationship.

the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

- (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

- (5) Where a conflict of interest does arise, Counsel must—
 - (a) promptly and fully inform each potentially affected Client of the nature and extent of the conflict; and
 - (b) either:
 - (i) take all steps necessary to remove the conflict; or
 - (ii) obtain the full and informed consent of all potentially affected Clients to continue the representation, so long as Counsel is able to fulfil all other obligations under this Code.

Article 10¹⁴⁴

Client under a Disability

When a Client's ability to make adequately considered decisions in connection with their representation is impaired because of minority, mental disability or any other reason, Counsel must:

- (a) inform the Judge or Chamber of the Tribunal hearing the matter, if any, of the disability;
- (b) take such steps as are necessary to ensure the adequate legal representation of that Client; and
- (c) as far as reasonably possible maintain a normal Counsel-Client relationship with the Client.

Article 11

Accounting for Time

Counsel should account in good faith for the time spent working on a case and maintain and preserve detailed records of time spent.¹⁴⁵

CONDUCT BEFORE THE TRIBUNAL

Article 12

Rules of the Tribunal

- (1) Counsel must at all times comply with the Rules and such rulings as to conduct and procedure as may be applied by the

144. Compare ABA Rule 1.14(a):

Rule 1.14 CLIENT UNDER DISABILITY

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

145. ICTR: Article 11 contains the additional sentence: "Counsel is under a duty to set his bills and fees with moderation."

Tribunal in its proceedings. Counsel must at all times have due regard to the fair conduct of proceedings.

- (2) Counsel must not, unless permitted by the Rules or this Code or the Judge or Chamber hearing the matter:
 - (a) make contact with a Judge or Chamber of the Tribunal without first or concurrently informing counsel acting for any other party to the proceedings;
 - (b) submit exhibits, notes or documents to the Judge without communicating them within first or concurrently to counsel acting for any other party to the proceedings.

Article 13

Candour Toward the Tribunal

- (1) Counsel is personally responsible for the conduct and presentation of their Client's case, and must exercise personal judgement upon the substance and purpose of statements made and questions asked.
- (2) Counsel must not knowingly:
 - (a) make an incorrect statement of material fact to the Tribunal;
 - or
 - (b) offer evidence which the Counsel knows to be incorrect.
- (3) Despite sub-article (2)(a), Counsel will not have made an incorrect statement to another party to the proceedings or to the Tribunal simply by failing to correct an error on any matter stated to Counsel or to the Tribunal during proceedings.
- (4) Counsel must take all necessary steps to correct an incorrect statement made by Counsel in proceedings before the Tribunal as soon as possible after Counsel becomes aware that the statement was incorrect.

Article 14

Integrity of Evidence

Counsel must at all times maintain the integrity of evidence, whether in written, oral or any other form, which is or may be submitted to the Tribunal.¹⁴⁶

146. ICTR: Article 14 contains an additional subsection (2):

If counsel's representation of a client terminates for any reason, counsel shall return evidence and other materials, which have come into his possession as a

Article 15

Impartiality of the Tribunal

- (1) Counsel must take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute.
- (2) Counsel must not seek to influence a Judge or other official of the Tribunal by means prohibited by the Statute, the Rules or this Code.

Article 16¹⁴⁷

Counsel as witness

Counsel must not act as advocate in a trial in which the Counsel is likely to be a necessary witness except where the testimony relates to an uncontested issue or where substantial hardship would be caused to the Client if that Counsel does not so act.

DUTY OF COUNSEL TO OTHERS

Article 17

Fairness and Courtesy to Opposing Party and Counsel

- (1) Counsel must recognise all other Counsel appearing or acting in relation to proceedings before the Tribunal as professional colleagues and must act fairly, honestly and courteously towards them and their Clients.¹⁴⁸

result of the said representation, to his former client, to the latter's counsel, or under seal to the Registrar for onward transmission to the said client or counsel, as appropriate.

147. Compare ABA Rule 3.7:

Rule 3.7 LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

148. Article 17(1) ICTR reads:

Article 17 Fairness and Courtesy

- (1) Counsel must act fairly, honestly and courteously towards all persons with whom they have professional contact, namely other Counsel, their Clients, Judges, members of the Office of the Prosecutor and Registry staff. Counsel shall recognise all other Counsel appearing or acting in

- (2) Counsel must not communicate with the Client of another Counsel except through or with the permission of that Client's Counsel.

Article 18

Dealing with Unrepresented Persons

- (1) If, on behalf of a Client, Counsel is dealing with a person who is not represented by counsel, Counsel:
 - (a) must not give advice to this unrepresented person if the interests of the person are, or have a reasonable possibility of being, in conflict with the interests of the Counsel's Client; but
 - (b) may advise the unrepresented person to secure legal representation.
- (2) Counsel must inform the unrepresented person of the role Counsel plays in the matter, the person's right to counsel under the Rules, and the nature of legal representation in general.

This information must be given whether or not a conflict exists or may exist with the interests of Counsel's Client.

MAINTENANCE OF THE INTEGRITY OF THE PROFESSION

Article 19

Conflicts

If there is any inconsistency between this Code and any other code which Counsel is bound to honour, the terms of this Code prevail in respect of Counsel's conduct before the Tribunal.

relation to proceedings before the Tribunal as professional colleagues.

Article 20¹⁴⁹

Misconduct

It is professional misconduct for Counsel, *inter alia*, to:

- (a) violate or attempt to violate this Code or to knowingly assist or induce another person to do so, or to do so through the acts of another person;
- (b) commit a criminal act which reflects adversely on Counsel's honesty, trustworthiness or fitness as Counsel;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct which is prejudicial to the proper administration of justice before the Tribunal; or
- (e) attempt to influence an officer of the Tribunal in an improper manner.

Article 21¹⁵⁰

Reporting Misconduct

(1) If:

- (a) Counsel knows that another Counsel has breached this Code or has otherwise engaged in professional misconduct; and
- (b) that violation or conduct raises a substantial question as to the other Counsel's honesty, trustworthiness or fitness as Counsel

Counsel may inform the Judge or Chamber of the Tribunal before which Counsel is appearing.¹⁵¹

149. Compare ABA Rule 8.4:

Rule 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

150. Compare ABA Rule 8.3 with the important distinction that the Code uses the word "may" instead of "shall," as far as counsel's duty to inform the court is concerned.

151. ICTR: Article 21 contains the following additional subsection (2): "The Registrar may also communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission or, if a Professor and not

Article 22
Enforcement

Counsel must abide by and voluntarily submit to any enforcement and disciplinary procedures as may be established by the Tribunal in accordance with the Rules.

Article 23
Amendment

This Code may be amended by the Registrar, after consultation with the Judges.

otherwise admitted to the profession, to the governing body of his University.”

APPENDIX II

RULES

Rule 44

Appointment, Qualifications and Duties of Counsel

- (A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. A counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that the counsel is admitted to the practice of law in a State, or is a University professor of law.
- (B) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel.

Rule 46

Misconduct of Counsel

- (A) A Chamber may, after a warning, refuse audience to counsel if, in its opinion, the conduct of that counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings.
- (B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a professor and not otherwise admitted to the profession, to the governing body of that counsel's University.

Rule 77

Contempt of the Tribunal

Any person who

- (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question,
- (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber, or
- (iii) without just excuse fails to comply with an order to attend before

- or produce documents before a Chamber, commits a contempt of the Tribunal.
- (B) Any person who threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness, commits a contempt of the Tribunal.
 - (C) Any person who threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber, commits a contempt of the Tribunal.
 - (D) Incitement to commit, and attempts to commit, any of the acts punishable under this Rule are punishable as contempts of the Tribunal with the same penalties.
 - (E) Nothing in this Rule affects the inherent power of the Tribunal to hold in contempt those who knowingly and willfully interfere with its administration of justice.
 - (F) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may, *proprio motu*, initiate proceedings and call upon that person that he or she may be found in contempt, giving notice of the nature of the allegations against that person. After affording such person an opportunity to appear and answer personally or by counsel, the Chamber may, if satisfied beyond reasonable doubt, find the person to be in contempt of the Tribunal.
 - (G) Any person so called upon shall, if that person satisfies the criteria for determination of indigency established by the Registrar, be assigned counsel in accordance with Rule 45.
 - (H) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal:
 - (i) under Sub-rules (A) and (E) above is a term of imprisonment not exceeding twelve months, or a fine not exceeding Dfl. 40,000, or both;
 - (ii) under Sub-rules (B), (C) or (D) above is a term of imprisonment not exceeding seven years, or a fine not exceeding Dfl. 200,000, or both.
 - (I) Payment of a fine shall be made to the Registrar to be held in a separate account.

- (J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good grounds being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision. Where such decision is rendered orally, the application shall be filed within seven days of the oral decision, unless
- (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
 - (ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Rule 97
Lawyer-Client Privilege

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

- (i) the client consents to such disclosure; or
- (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.